No. 15-278

IN THE

Supreme Court of the United States

AMGEN INC., *et al.*,

Petitioners,

v.

STEVE HARRIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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October 5, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, Washington Legal Foundation (WLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of petitioners. On September 21, 2015, more than 10 days prior to the due date for WLF's brief, undersigned counsel notified all counsel of record of WLF's intention to file. Although petitioners' counsel of record consents to the filing of WLF's brief, respondents' counsel of record "take[s] no position on whether [WLF] may file an amicus brief." Accordingly, this motion for leave to file is necessary.

WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. WLF opposes plaintiffs' use of prohibitively high discovery and litigation costs as strategic leverage to extract settlements for frivolous claims. To that end, WLF regularly appears as *amicus curiae* in this and other federal courts to emphasize the indispensable role that adherence to robust pleading standards plays in filtering out frivolous claims. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

WLF is concerned that unless courts are willing to dismiss ERISA complaints that fail to satisfy the stringent pleading requirements this

Court established in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the burdensome costs of litigation will drive many defendants to pay substantial sums to settle even the most insubstantial of ERISA lawsuits. While the company and its shareholders are the immediate victims of such settlements, the long-term victims are everyday Americans who lose jobs or pay more for goods and services due to the enormous costs exacted by abusive litigation.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It submits this brief solely due to its interest in ensuring the Court's further review of the important questions presented by the petition. Because of its lack of a direct interest, WLF believes that it can assist the Court by providing a perspective that is wholly distinct from that of any party.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate as an *amicus curiae* in this case.

Respectfully submitted,

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October 5, 2015

QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the decision below conflicts with *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), as four members of the court of appeals concluded in dissenting from the denial of rehearing en banc.

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INTERESTS OF *AMICUS CURIAE*[1]

The interests of Washington Legal Foundation (WLF) are more fully set forth in its accompanying motion for leave to file this brief. In short, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF agrees with petitioners that the Ninth Circuit's deeply flawed opinion carries disastrous implications that go well beyond the parties and facts of this case. By disregarding the stringent pleading standard announced by this Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the panel's decision creates sweeping new rules for ERISA fiduciaries that are contrary to those recognized by the Court and established by Congress. WLF is concerned that, unless reversed, the holding below will severely undermine the ability of ERISA fiduciaries to determine their legal obligations with respect to company stock funds. For the reasons that follow, WLF joins with petitioners in urging the Court to grant review in this case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part, and that no person or entity—other than WLF and its counsel—made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for all parties with notice of WLF's intent to file.

STATEMENT OF THE CASE

Respondents are former Amgen employees who participated in Amgen-sponsored retirement plans during their employment. After the price of Amgen stock fell, respondents brought a putative class action against Amgen, claiming that petitioners violated their fiduciary duties under the Employee Retirement Income Security Act of 1974, Pub L. No. 93-406, 88 Stat. 829 (ERISA), by failing to take action once they learned adverse non-public information about the company. Specifically, respondents alleged that petitioners violated their duty of prudence by permitting plan participants to continue investing in Amgen stock when they knew or should have known that such investment was imprudent given unfavorable clinical studies of an anemia drug (and Amgen's allegedly improper "off label" marketing of that drug).

The district court, after giving respondents multiple opportunities to refine their claims, dismissed the operative complaint with prejudice for failure to state a claim.[2] Pet. App. 59a-75a. Incorporating portions of its prior opinion, the district court held that under ERISA's "prudent man" standard, 29 U.S.C. 1104(a)(1)(B), respondents failed to sufficiently allege "that the continued offering of the Amgen investment option was

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[2] In dismissing the penultimate complaint, the district court noted: "This appears to be a securities case posing as an ERISA case." Pet. App. 75a. Indeed, a securities class action based on identical facts to this case is currently pending in the district court before the same district judge. *See In re Amgen Inc., Sec. Litig.*, No. 07-cv-2536 (C.D. Cal.).

imprudent." *Id.* at 102a. Whereas the complaint alleged that petitioners should have eliminated Amgen stock as an investment option, the district court explained that had petitioners done so, "they would have been subject to lawsuits if the price of Amgen stock later rose" and "may have violated federal securities laws because the decision would have been based on inside information." *Id.* at 102a. As to whether petitioners should have disclosed the inside information to respondents, the court emphasized that ERISA fiduciaries have no such "general affirmative duty to disclose," which could "run the risk of disturbing the carefully delineated corporate disclosure laws." *Id.* at 103a-104a.

The Ninth Circuit reversed. *Harris v. Amgen, Inc.*, 738 F.3d 1026 (9th Cir. 2013). Applying the prudent-man standard of care, the panel held that because the complaint alleged that *some* petitioners knew of or participated in alleged omissions and misrepresentations that led to the decline in Amgen's stock price, Respondents had sufficiently stated a claim under ERISA against *all* petitioners. *Id.* at 1039-42. The panel acknowledged that eliminating company stock as an investment option "may well have caused a drop in the share price," but it concluded that "several factors [would] mitigate this effect." *Id.* at 1041. These factors included the panel's speculation "that the ultimate decline in price would have been no more than the amount by which the price was artificially inflated" (despite the absence of any such allegation in the complaint), and its assertion that "once the Fund was removed as an investment option, employees would have been prevented from making additional investments in

the Fund while the price remained artificially inflated." *Id.*

The panel also rejected the district court's conclusion that respondents' duty-of-loyalty claim was precluded by their failure to plead detrimental reliance. Although no party had briefed or even argued that the "fraud-on-the-market" theory of indirect reliance applies outside the context of securities fraud, the panel held otherwise. *Id.* at 1043. "We see no reason why ERISA plan participants who invested in a Company Stock Fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor." *Ibid.*

Amgen petitioned for certiorari, asking the Court to hold the case pending its decision in *Fifth Third Bancorp v. Dudenhoeffer*, which presented a theory of ERISA liability nearly identical to the one at issue here. While Amgen's petition was still pending, this Court issued its unanimous opinion in *Fifth Third*.

In *Fifth Third*, this Court recognized the legitimate competing interests that often confront ERISA fiduciaries, who are forced to make complex decisions in the face of uncertainty about their legal authority to act on inside information under federal securities laws. Among other things, *Fifth Third* established clear pleading requirements on those seeking to impose liability on ERISA fiduciaries. Specifically, the Court held that to state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must allege a plausible

alternative action the defendant could have taken that (1) would have been consistent with federal securities laws, and (2) *could not* have been viewed by a prudent fiduciary as more likely to harm than help the relevant employee-stock fund. *Id.* at 2472-73.

After announcing new pleading standards under ERISA in *Fifth Third*, the Court granted Amgen's petition, vacated the panel's judgment, and remanded for consideration in light of *Fifth Third*. *See Amgen Inc. v. Harris*, 134 S. Ct. 2870 (2014). On remand, Amgen urged the panel to remand the case to the district court to afford plaintiffs an opportunity to amend the complaint in an effort to satisfy *Fifth Third*'s stringent new pleading requirements. Instead, the panel largely reinstated its earlier opinion with only minor revisions. Amgen timely petitioned for rehearing or rehearing en banc, arguing that the panel's decision conflicted with *Fifth Third*.

Amgen's petition was denied, but the panel simultaneously issued an amended opinion. *See* Pet. App. 2a. The panel deemed respondents' duty-of-prudence claim sufficiently pled because it was "quite plausible" that Amgen "could remove the Fund from the list of investment options without causing undue harm to plan participants." *Id.* at 41a. The panel also speculated that Amgen could have protected plan participants by disclosing the alleged inside information to the "general public" without directly violating federal securities laws. *Id.* at 42a-43a. At no point did the panel consider whether "a prudent fiduciary in [Amgen's] position could not have concluded" that either of these alternatives

"would do more harm than good to the fund." *Fifth Third*, 134 S. Ct at 2473.

Judge Kozinski, joined by Judges O'Scannlain, Callahan, and Bea, dissented forcefully from the denial of rehearing en banc. Pet. App. 9a-20a. The dissent noted that although *Fifth Third* "created stringent new requirements for plaintiffs who sue fiduciaries under ERISA for imprudent investment in an employer's stock," the panel opinion "not only fails to give effect to those requirements, but also insulates our circuit law from important aspects of the Supreme Court's holding." *Id.* at 9a. Explaining that "the panel's reasoning render[ed] meaningless crucial language in *Fifth Third*," *id.* at 14a, the dissent warned that, under the panel's new precedent, "a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw a fund" or similarly fails to "immediately disclose inside information." *Id.* at 16a, 18a. As a result, the dissent concluded, "the panel's decision creates almost unbounded liability for ERISA fiduciaries" and "will have grave consequences for corporations across America." *Id.* at 9a.

At Amgen's request, the Ninth Circuit stayed issuance of the mandate pending disposition of the petition.

SUMMARY OF ARGUMENT

The Ninth Circuit misapplied this Court's mandate in *Fifth Third* by holding that dismissal of the operative complaint was inappropriate because it was "*quite plausible*" for petitioners to "remove the Fund from the list of investment options without

causing undue harm to plan participants." Pet. App. 41a. As the express language of *Fifth Third* makes clear, the test is not whether a prudent fiduciary *could have* concluded that the proposed alternative action would cause no undue harm. Rather, *Fifth Third* requires precisely the opposite inquiry—in testing the sufficiency of the complaint, district courts must determine whether the complaint plausibly alleges that a prudent fiduciary "*could not* have concluded that" the proposed alternative action "would do more harm than good." 134 S. Ct. at 2473.

Contrary to the Ninth Circuit, an allegation that a prudent fiduciary might have reached a contrary conclusion from petitioners is legally insufficient to state a claim. To avoid dismissal, a plaintiff must plausibly allege that *no* prudent fiduciary could have concluded that the proposed alternative action would have caused more harm than good to the fund as a whole. Simply put, the allegations contained in the operative complaint do not remotely satisfy this stringent new pleading requirement. Accordingly, the panel should have remanded the case back to the district court to permit respondents an opportunity to satisfy *Fifth Third*'s new pleading standard. Its refusal to do so was a clear legal error that should be reversed, if not summarily, then after full plenary review.

Review is also warranted because of the burdensome unjustified expenses and costs petitioners will incur if they are forced to defend this suit beyond the pleading stage. As this Court has recognized, the important gatekeeping function of Rule 12(b)(6) is particularly salient in the ERISA context, where allowing legally novel and untenable

claims to proceed through the discovery phase imposes extraordinary and unwarranted costs on defendants. To eliminate the perverse incentives that the panel opinion creates for parties to bring speculative ERISA claims in the hopes of achieving a settlement, this Court should grant review.

The Court should also grant review to ensure that the plaintiffs' bar does not seize on the Ninth Circuit's new relaxed pleading standard as another reason to bring securities claims under the guise of ERISA claims. Plaintiffs have increasingly come to view ERISA as a way to bypass the important protections of the Private Securities Litigation Reform Act (PSLRA). Congress enacted the PSLRA, which imposes heightened pleading standards and an automatic discovery stay on securities actions, to prevent plaintiffs from filing frivolous securities fraud lawsuits in the hopes of using untenable discovery and litigation costs to obtain a settlement. By improperly conflating liability under ERISA with liability under the securities laws, the decision below increases the likelihood that plaintiffs will continue to use ERISA as a means of circumventing the important procedural safeguards that the PSLRA affords to defendants.

The interests of fairness, predictability, and *stare decisis* were all injured in this case. WLF joins with petitioners in urging this Court to grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CLEAR HOLDING IN *FIFTH THIRD*

In its previous ruling in this case, the Court granted Amgen's petition, vacated the Ninth Circuit's reversal of the district court's dismissal of respondents' complaint, and remanded for further consideration in light of *Fifth Third*—which significantly altered the pleading standards for alleging that ERISA fiduciaries breached their duty of prudence. *See Amgen Inc. v. Harris*, 134 S. Ct. 2870 (2014). This Court's holding in *Fifth Third* could not have been any clearer: "a plaintiff *must* plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws *and* that a prudent fiduciary in the same circumstances *would not* have viewed as more likely to harm the fund than to help it." *Fifth Third*, 134 S. Ct. at 2472 (emphases added). The Court then went on to articulate "three points [that] inform the requisite analysis." *Ibid.*

First, the Court confirmed that ERISA "does not require a fiduciary to break the law" by selling company stock based on inside information, and that any complaint premised on "the theory that the duty of prudence required petitioners to sell the ESOP's holdings" of employer stock should be dismissed. *Id.* at 2472-73. Second, the Court held that any time a complaint alleges that a fiduciary should have disclosed non-public information or refrained from purchasing additional stock on the basis of inside information, the reviewing court must "consider the

extent to which [such] an ERISA-based obligation ... could conflict with the complex insider-trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.* at 2473. Third, the Court held that the reviewing court should consider "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not* have concluded" that the suggested alternative course of conduct "would do more harm than good." *Ibid* (emphasis added).

Rather than follow this Court's directive, the Ninth Circuit panel recited but ultimately ignored *Fifth Third*'s new pleading requirements and refused to remand the case back to the district court to apply that standard in the first instance. Instead, the panel deemed respondents' complaint sufficient on the basis that it was "*quite plausible*" for petitioners to "remove the Fund from the list of investment options without causing undue harm to plan participants." Pet. App. 41a (emphasis added). But whether some hypothetical, alternative action seems "quite plausible" to federal appellate judges who, in the quiet of their chambers, second-guess difficult choices made years earlier by ERISA fiduciaries, is not the standard. Rather, *Fifth Third* requires exactly the opposite inquiry. In testing the sufficiency of a complaint, the only relevant inquiry is "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not have* concluded" that the suggested alternative course of conduct "would do more harm than good." *Fifth Third*, 134 S. Ct. at 2472 (emphasis added). Even the most cursory examination of the operative complaint in this case reveals that it fails that test.

A. The Operative Complaint Is Not Viable Under *Fifth Third*

The allegations contained in the operative complaint do not remotely satisfy the stringent new pleading requirement specified in *Fifth Third*. Respondents' First Amended Complaint alleges that petitioners violated their duty of prudence under ERISA by "offering Amgen stock as an investment option ... when it was no longer a prudent retirement investment." First. Am. Compl. ¶338. The complaint further alleges that petitioners should either have made "appropriate public disclosures" of non-public inside information or else "[p]recluded additional investment in [Amgen's] Stock." *Id.* at ¶338. But nowhere do respondents allege—let alone *plausibly* allege—that "a prudent fiduciary in the defendant's position could not have concluded that stopping purchases ... or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Fifth Third*, 134 S. Ct. at 2473.

On the contrary, respondents' own complaint concedes that at least one of the alternatives respondents propose would have done *more harm than good* to plan participants: "If Company Stock were eliminated as an investment option under the Plan, this would have sent a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen stock and a drop in the stock price." First Am. Compl. ¶330. Given these glaring pleading deficiencies, the operative complaint in this case cannot possibly be said to state a claim under *Fifth Third*.

Notwithstanding the panel's ruling, the fact that *some* prudent fiduciary *might* have reached a conclusion contrary to that of petitioners is an insufficient allegation. Indeed, as Judge Kozinski pointed out in dissent, *Fifth Third* clarifies that "there is no liability if *any* 'prudent fiduciary ... could ... have concluded that [the proposed alternative action] would do more harm than good.'" Pet. App. 12a (Kozinski, J., dissenting from denial of rehearing en banc) (quoting *Fifth Third*, 134 S. Ct. at 2473).

B. The Court Should Act Now to Prevent Other Courts from Replicating the Ninth Circuit's Error

In *Fifth Third*, this Court significantly altered the standard for holding ERISA fiduciaries liable, particularly with regard to insider fiduciaries whose actions implicate the securities laws as well as ERISA. How lower courts apply that standard in the wake of *Fifth Third* is of critical importance to ERISA fiduciaries attempting to discharge their legal obligations without incurring massive liability. Unfortunately, under the panel's new precedent, "a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw a fund" or similarly fails to "immediately disclose inside information." Pet. App. 16a, 18a (Kozinski, J., dissenting from denial of rehearing en banc).

Given the impossible situation in which the panel decision below has placed ERISA fiduciaries, the court cannot afford to wait for the questions presented in the petition to percolate any further

before deciding to resolve them. Further percolation is especially unwarranted because the panel's misapplication of *Fifth Third* is already having severe repercussions—well beyond the confines of the Ninth Circuit. Indeed, lower federal courts have already begun relying on the panel's decision to allow ERISA plaintiffs to obtain discovery in order to bolster their factual allegations *after* the pleading stage.

In *Gedek v. Perez*, 66 F Supp. 3d 368, 381 (W.D.N.Y. 2014), the Western District of New York relied on the decision below in allowing putative class-action plaintiffs to survive a Rule 12(b)(6) motion. The plaintiffs in *Gedek* alleged that the "defendants knew or should have known that [the company's] financial condition was poor, that its long-term prospects were not good, and that as a result, its stock price was going to continue to decline, which in fact it did." *Id.* at 373. Likewise, the plaintiffs alleged that "it was imprudent of defendants to continue to permit the Plans to offer [the company's stock] to participants, or to continue to purchase or hold [the] stock." *Ibid.*

As here, nowhere did the *Gedek* complaint allege—as required by *Fifth Third*—that a prudent fiduciary *could not* have concluded that the proposed alternative actions would do more harm than good. Nonetheless, emphasizing that the case was "only at the pleading stage," the district court—citing the panel decision below—held that the plaintiffs' conclusory allegations stated "a facially valid claim" under ERISA. *Id.* at 378, 381 (citing *Harris v. Amgen, Inc.*, 770 F.3d 865, 882 (9th Cir. 2014)). Although plaintiffs could not identify any specific

time during the class period at which it became imprudent to continue selling company stock, the court simply concluded that "these are issues that remain for discovery and later resolution, either at trial or on a motion for summary judgment." *Id.* at 381.

In *In re BP P.L.C. Sec. Litig.*, No. 4:10-cv-4214, 2015 WL 1781727 (S.D. Tex. Mar. 4, 2015), the Southern District of Texas followed the Ninth Circuit panel's troubling conflation of federal securities law and ERISA. In permitting plaintiffs to re-plead their duty-of-prudence claim under ERISA, the court concluded that because a named defendant was "simultaneously accused of violating the securities laws" he was therefore "adequately alleged to have had the type of insider information which would implicate the ERISA duty of prudence." *Id.* at *12 (citing *Harris*, 770 F.3d at 877).

Following further the Ninth Circuit's error, the district court held that dismissal is inappropriate unless it could be determined from the pleadings that "*no* prudent fiduciary would have concluded that" the proposed alternative actions "would do more *good than harm*." *Id.* at *17 (emphasis added). Thus, like the panel below, the district court replaced *Fifth Third*'s rigorous standard with the its own much lower hurdle of merely suggesting any alternative action that *some* fiduciary might have viewed as prudent. *Ibid.* The Fifth Circuit has accepted interlocutory review of the district court's order. *See In re BP P.L.C. Sec. Litig.*, No. 15-90010 (May 20, 2015 5th Cir).

The Northern District of Ohio has also

embraced the Ninth Circuit's erroneous application of *Fifth Third*. In *Murray v. Invacare Corp*, No. 1:13-cv-1882, 2015 WL 5093438, at *1 (N.D. Ohio Aug. 28, 2015), the court considered similar claims that ERISA fiduciaries breached their duties of prudence and loyalty by "allow[ing] plan participants to acquire more shares of [company] stock at a time when Defendants knew [that] stock was an imprudent investment." As here, the defendants moved to dismiss the complaint for failure to satisfy *Fifth Third*'s new pleading standard.

Explicitly relying on the Ninth Circuit's decision in this case, the district court recognized that "closing the stock fund is a fairly extreme action with significant consequences," but nonetheless denied the motion to dismiss on the theory that a prudent fiduciary plausibly "*could have*" concluded otherwise. The district court in *Murray* thus adopted the Ninth Circuit's erroneous inversion of the actual rule announced in *Fifth Third*, transforming this Court's impossibility standard into one of mere possibility. *Compare Fifth Third*, 134 S. Ct. at 2473 ("[A] prudent fiduciary in the defendant's position *could not* have concluded that [a proposed alternative action] *would* do more harm than good.") *with Murray*, 2015 WL 5093438, at *6 ("[A] prudent fiduciary in Defendants' position *could have* concluded that [a proposed alternative action] would not have caused the Plan more harm than good.") (emphases added). If even a district court in the very circuit from which *Fifth Third* arose is now applying the wrong standard, then the need for this Court to intervene is both dire and manifest.

Each of these cases[3] demonstrates why the Court cannot afford to wait for the important issues presented here to percolate further before deciding to resolve them. Absent this Court's review, ERISA fiduciaries will be left to deal with the disastrous consequences of the Ninth Circuit's precedent below. That opinion "bless[ed] a complaint that does nothing more than allege the hypothetical capability of withdrawing the fund, without requiring a single allegation regarding the probable effects of that withdrawal." Pet. App. 16a (Kozinski, J., dissenting from denial of rehearing en banc). To prevent that misguided approach to *Fifth Third* from metastasizing any further, this Court should not pass up the opportunity this case affords.

II. REVIEW IS NECESSARY TO VINDICATE THE IMPORTANT GATEKEEPING FUNCTION OF RULE 12(b)(6)

This Court's review is especially warranted given the procedural posture of this case. Although Rule 12(b)(6) is an "important mechanism for weeding out meritless claims," *Fifth Third*, 134 S. Ct. at 2471, the panel's misguided holding effectively jettisons the district court's vital gatekeeping function. As *Fifth Third*'s new ERISA pleading requirements make clear, the allegations in respondents' complaint—even if entirely true—do not give rise to a "reasonable inference" that petitioners breached their fiduciary duties under

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[3] Although *Gedek*, *BP*, and *Murray* all relied on the now-vacated 2014 panel decision, rather than the subsequent May 2015 amended decision, the two opinions are largely identical in relevant part.

ERISA. *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009). Where, as here, legally novel and untenable claims are allowed to survive a Rule 12(b)(6) motion to dismiss, granting certiorari serves both the interests of judicial efficiency and the interests of justice.

As the Court has recognized, because an ERISA fiduciary's "duty of prudence turns on 'the circumstances ... prevailing' at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Fifth Third*, 134 S. Ct. at 2471 (citation omitted). Evaluating that context "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Ibid.* That is why this Court has emphasized the importance of district courts' applying their "judicial experience"—along with their "common sense"—in disposing of legally untenable lawsuits at the proper time: *before* a plaintiff launches intrusive and burdensome discovery. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007).

When properly granted, motions to dismiss for failure to state a claim help "to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010). Accordingly, before a plaintiff can impose on a defendant the burden and expense of discovery, a plaintiff must first articulate a plausible legal theory that, if supported by the facts, would entitle the plaintiff to relief from the defendant. *See, e.g., DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)

("The price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.").

Permitting meritless claims to proceed past the pleading stage, particularly in ERISA cases, forces a defendant—or multiple defendants in the case of ERISA fiduciaries—to bear a substantial and unjustifiable burden in discovery and litigation costs. ERISA litigation routinely requires defendants to spend millions of dollars simply to advance to the summary judgment phase, consuming enormous time and resources from counsel, clients, and the courts. As the Second Circuit has explained in affirming dismissal under Rule 12(b)(6) in a similar case, "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *PBGC v. Morgan Stanley*, 712 F.3d 705, 719 (2d Cir. 2013).

Moreover, allowing a legally dubious ERISA claim to advance to summary judgment not only wastes substantial resources but creates harmful incentives for parties to bring speculative claims in the hopes of achieving a settlement. Because discovery is so often daunting and expensive, ERISA lawsuits can amass substantial settlement value once they survive a Rule 12(b)(6) motion to dismiss. Many such cases have settled for tens of millions of dollars. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 135 (S.D.N.Y. 2010) (approving $35 million settlement of ERISA claims); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02-Civ-8853

SWK, 2006 WL 2789862, *1 (S.D.N.Y. Sept. 27, 2006) (approving $100 million settlement of ERISA claims); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 447 (S.D.N.Y. 2004) (approving $78 million settlement of ERISA claims).

Such incentives increase the likelihood that "a plaintiff 'with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). To avoid such a result, and to accomplish the important gatekeeping function of Rule 12(b)(6), the Court should grant the petition.

III. REVIEW IS WARRANTED TO DETER SECURITIES PLAINTIFFS FROM USING ERISA TO BYPASS THE PROTECTIONS OF THE PSLRA

As the district court rightly observed, "this appears to be a securities case posing as an ERISA case." Pet. App. 75a. Nonetheless, the panel below—even with the benefit of that insight—explicitly relied on alleged securities law violations to justify reversing the district court's dismissal under ERISA. *See* Pet. App. 37a-38a ("If the alleged misrepresentations and omissions, scienter, and resulting decline in share price in [the parallel securities action] were sufficient to state a claim that defendants violated their duties under Section 10(b), the alleged misrepresentations and omissions, scienter, and resulting decline in share price in this

case are sufficient to state a claim that defendants violated their more stringent duty of care under ERISA.").

Conflating liability under ERISA with liability under the securities laws is especially problematic. "ERISA and the securities laws ultimately have differing objectives pursued under entirely separate statutory schemes designed to protect different constituencies—ERISA plan purchasers in the first instance and purchasers and sellers of securities in the second." *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-MD-2017 (LAK), 2015 WL 4139978, at *16 (S.D.N.Y. July 10, 2015). "ERISA is not the statutory mechanism to pursue such [securities] claims." *Ibid.*

Nonetheless, ERISA lawsuits are increasingly viewed as a means of circumventing the important procedural safeguards afforded to defendants under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (PSLRA). Enacted by Congress in an "effort to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits," the PSLRA places "special burdens" on plaintiffs seeking to bring federal securities fraud actions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006).

The PSLRA imposes a heightened pleading standard that requires all federal securities fraud complaints to "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." 15 U.S.C. § 78u-4(b)(2). The PSLRA also explicitly provides for a "motion to dismiss" premised upon any "failure to

meet" the "pleading requirements" of 15 U.S.C. §§ 78u-4(b)(1) and (b)(2), and directs that the "court shall, on the motion of any defendant, dismiss the complaint" if the statutory pleading requirements are not met. 15 U.S.C. § 78u-4(b)(3)(A). And, to prevent plaintiffs from filing securities fraud lawsuits "in order to conduct discovery in the hopes of finding a sustainable claim not alleged in the complaint," S. Rep. No. 104-98, at 14 (1995), Congress further directed that "all discovery and other proceedings shall be stayed during pendency of any motion to dismiss." 15 U.S.C. § 78u-4(b)(3)(B).

Because the procedural protections of the PSLRA do not apply in an ERISA action for breach of fiduciary duty, more and more plaintiffs have come to view ERISA as a convenient way to bypass those heightened requirements altogether. In the last 20 years since enactment of the PSLRA, the plaintiffs' bar has filed hundreds of ERISA "stock-drop" cases in lieu of, or in addition to, securities class actions where employer-issued stock experienced a loss in value.

By bringing suit under ERISA rather than federal securities laws, securities plaintiffs can thus obtain early discovery and seek to force a quick settlement. *See, e.g.*, Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?*, 26 HOFSTRA LAB. & EMP. L.J. 497, 508 (2008) ("Strategically, filing an ERISA lawsuit in addition to the securities action may allow plaintiffs to circumvent the discovery safeguards of the PSLRA and deploy the tools of discovery to uncover wrongdoing or exert settlement pressures."); Douglas

E. Motzenbecker, *ERISA-Related Securities Litigation Imposes Undue Burden on Pension Plans and Participants*, WLF LEGAL BACKGROUNDER (July 1, 2005) ("ERISA affords plaintiffs certain procedural and substantive advantages over traditional securities suits, and plaintiffs' lawyers have been exploiting this loophole in the law.").

In blurring the line between alleged securities law violations and violations of the duty of care under ERISA, the Ninth Circuit's holding further increases the likelihood that the PSLRA's automatic heightened pleading standard and discovery stay will be rendered nugatory in future cases. "If plaintiffs in a securities case could, by tacking ERISA claims onto underlying Securities actions, obtain discovery to which they would otherwise not be entitled under the PSLRA, then the PSLRA's mandatory stay provision would, as a practical matter, never apply." *In re Time Warner, Inc. Sec., & ERISA Litig.*, MDL No. 1500-02, 2003 WL 22227945, *2 (S.D.N.Y. Sept. 26, 2003).

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF respectfully requests that the Court grant the petition and summarily reverse the judgment below. Alternatively, WLF asks the Court to undertake plenary review to correct the manifest errors in the Ninth Circuit's opinion.

Respectfully submitted,

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October 5, 2015